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APR 8, 1954
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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1953.~~ 54

No. ~~[redacted]~~ 30

THE REPUBLIC OF CHINA,
Respondent,

and

THE SHANGHAI-NANKING RAILWAY ADMINISTRATION, MOH HAN, as Director of the Shanghai-Nanking Railway Administration, SAU CHEN, as Deputy Director of the Shanghai-Nanking Railway Administration,
Defendants,

v.

THE NATIONAL CITY BANK OF NEW YORK,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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April 7, 1954.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 612.

THE REPUBLIC OF CHINA,

Respondent,

and

THE SHANGHAI-NANKING RAILWAY ADMINISTRATION, MOH HAN, as Director of the Shanghai-Nanking Railway Administration, SAU CHEN, as Deputy Director of the Shanghai-Nanking Railway Administration,

Defendants,

v.

THE NATIONAL CITY BANK OF NEW YORK,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court for the Southern District of New York (R. 35) is reported in 108 F. Supp. 766, and its opinion denying reargument and leave to amend (R. 55) in 14 F. R. D. 186. The opinion of the Court of Appeals for the Second Circuit (R. 64) is reported in 208 F(2) 627.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on December 8, 1953 (R. 72). The petitioner invokes the jurisdiction of this Court under 28 U. S. C. 1251(1).

Question Presented.

Actually, none of the questions which the petition sets forth is presented by the pleadings in this case. Petitioner's amended answer pleads not "set-offs" but "counterclaims" which demand affirmative judgment against The Nationalist Government of The Republic of China based on alleged transactions connected with public or governmental activity, as distinguished from private or commercial acts.

Petitioner seeks to have this Court review, not the amended pleading which it served and filed, but a proposed further amended pleading which it never served and filed because the lower court refused petitioner permission to make the further amendment and its decision was not disturbed by the Court of Appeals.

What the lower court dismissed were not "set-offs", but were full "counterclaims" pleaded by petitioner demanding affirmative judgment against The Nationalist Government of The Republic of China in the total amount of $1,634,432.00, with interest and costs (R. 23-27, 36, 41). Since petitioner concedes it is not entitled to affirmative judgment in any amount against the sovereign, The Republic of China (Petitioner's brief, p. 2), there can be no question concerning the propriety of the lower court's action

in dismissing the counterclaims wherein such admitted unauthorized relief was demanded.

It is true that petitioner after dismissal of the counterclaims by final order of the lower court moved for reargument and for permission to submit a further amendment of its answer (R. 46). But the amendment sought was to plead set-offs "also" and "in addition to" (R. 47) the pleaded counterclaims demanding affirmative judgment. Moreover, the motion was denied by order of the lower court as untimely (R. 55, 57) and the Court of Appeals, on appeal therefrom by petitioner (R. 58), affirmed this order as well as the previous final order dismissing the pleaded counterclaims (R. 72). Because the Court of Appeals in its opinion declared it would reach "the same result if we regard the counterclaims as but set-offs" (R. 67-68), in no way alters the fact that they have never been pleaded as set-offs and that the final order and judgment, affirmed by the Court of Appeals and which this Court is asked to review, dismisses not set-offs but counterclaims demanding affirmative judgment which petitioner acknowledges were improper.

For the remainder of this brief, however, we shall assume *arguendo,* as apparently petitioner has done, that dismissal of "set-offs", rather than of counterclaims demanding affirmative judgment, is here involved. We submit, however, that the cause still would not be one for certiorari, since, contrary to petitioner's assertions, there is no confusion in this field of law; all authoritative decisions have consistently restricted "set-offs" against a foreign sovereign plaintiff to those related to the subject matter of the main suit. Neither is there any conflict with State Department views.

Statement.

Respondent, The Nationalist Government of The Republic of China, is one of several plaintiffs* which has brought suit against the petitioner, The National City Bank of New York, to recover $200,000 deposited at its New York City branch.

The Secretary of State, pursuant to Section 25(b) of the Federal Reserve Act, has certified to petitioner that the deposit in question belongs to respondent (R. 8, 11).

Although the express provisions of Section 25(b) exonerate petitioner from all further liability once it honors the certification made by the Secretary of State, petitioner refused to comply with the certificate, but instead asserted that there were other adverse claims to the bank deposit in question, obviously made on behalf of the Communist Government of China which is not recognized by the United States. On that basis, petitioner succeeded in staying respondent's suit for one year in order to give notice, pursuant to New York Civil Practice Act §51-a, to the alleged adverse claimants in Peking and in Shanghai, China, advising them that unless they brought suit on the deposit in question before the one-year stay expired, their causes of action would be time-barred in N. Y. under that statute.

On March 7, 1952, before the one-year stay expired, petitioner served its answer, wherein no counterclaim or set-off of any kind was pleaded.

After the one-year stay had been obtained and the notice had been served on the alleged adverse claimants repre-

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* The other plaintiffs are the agency of respondent, the Shanghai-Nanking Railway Administration, in whose name the account was opened, and the two directors of that agency, Moh Han and Sau Chen, who have been certified by the State Department pursuant to §25b of the Federal Reserve Act (12 U. S. C. §632) as possessing authority to receive the funds for that agency on behalf of respondent, The Republic of China.

senting the Communist regime, a separate suit was actually started against petitioner in the Southern District by the Communist Government of China, particularly the Nanking-Shanghai Railway Administration, K. F. Mok and Y. T. Yu (Civ. No. 77-1/1952). However, on December 3, 1952, petitioner entered into a stipulation permitting those alleged adverse claimants to discontinue the suit, the stipulation reciting that the parties were remitted to such rights, powers, privileges and immunities as each may have in respect to the other as though the suit had not been commenced.

On July 11, 1952, prior to the signing of that stipulation, petitioner served an amended answer herein setting forth two counterclaims solely "against plaintiff, The Republic of China" (R. 23, 25), and it specifically alleged as part of these counterclaims that "The plaintiff, The Republic of China, is, and it all times hereinafter mentioned was a sovereign government recognized as such by the duly appointed Executive Department of the Government of the United States" (R. 23, 25).

Both of the counterclaims arose out of transactions completely unrelated to the bank deposit for which respondent sues.

The first counterclaim was based on a note, allegedly given in 1920 by respondent to J. P. Morgan & Co. (R. 24), not a party to this litigation.

Its second counterclaim was based on Treasury Notes allegedly given by respondent to the Shanghai foreign branch of petitioner in 1947 and in 1948 payable at The Central Bank of China (R. 25).

The amended answer based on these counterclaims sought affirmative judgment against respondent, The Republic of China, in the amount of $1,634,432.00, with interest and costs (R. 26-27).

Respondent's motion to dismiss the counterclaims (R. 34) was granted with an opinion by the lower court (R. 35, 41). Petitioner's subsequent motion for reargument and for leave to further amend its answer (R. 46) was denied also with an opinion by the lower court (R. 55, 57). On appeal taken by petitioner from both orders (R. 42, 58), the Court of Appeals for the Second Circuit in an unanimous opinion (R. 64) affirmed both orders (R. 72).

I.

Petitioner does not cite one authoritative decision which supports its contention that the Court of Appeals erred "in holding that a right of counterclaim (set-off) against a foreign sovereign is limited to the 'subject matter of the suit';" (Petitioner's brief, p. 10). Although when a sovereign sues "it so far takes the position of a private suitor as to agree by implication that justice may be done *with regard to the subject matter*" (*U. S.* v. *The Thelka,* 266 U. S. 328, 339-340), it has consistently been held that where the alleged set-off is unrelated to the subject matter of the action, the sovereign plaintiff remains immune. *Re Monongahela Rye Liquors,* 141 F(2) 864 (3rd Cir., 1944); *Republic of China* v. *American Express Co.,* 195 F(2) 230 (2 Cir., 1952); *In re Greenstreet, Inc.,* 209 F(2) 660 (7th Cir., 1954), and cases cited therein.

Petitioner makes the unfounded statement that some confusion exists in this field of law, citing the lower court decisions of *The Gloria, The Thelka, The F. J. Luckenbach, Kingdom of Norway* v. *Federal Sugar Refining Co.,* 286 Fed. 188 (S. D. N. Y.) and *State of Russia* v. *Bankers Trust Co.,* 4 F. Supp. 417 (S. D. N. Y.) (Petitioner's brief, pp. 15-16). However petitioner fails to state that appeals were taken in both of these cases and that the higher courts followed the principle of law again recognized in

the present case, that only set-offs related to the main suit may be pleaded against a sovereign plaintiff.

The Gloria, The Thelka, etc. v. *Federal Sugar Refining Co.*, 286 Fed. 188, cited by petitioner, resulted in questions being certified by the Court of Appeals for the Second Circuit in 295 Fed. 1020, and in the questions being answered by this Court in 266 U. S. 328 (1924). This is the same *Thelka* case which has frequently been cited, and referred to on page 6 of this brief, for the proposition that, when a sovereign sues in our courts to enforce a claim, "it so far takes the position of a private suitor as to agree by implication that justice may be done *with regard to the subject matter.*" 266 U. S. 328, 339-340.

State of Russia v. *Bankers Trust Company*, 4 F. Supp. 417, cited by petitioner, was affirmed *sub nom. United States* v. *National City Bank of New York*, 83 F(2) 236 (2 Cir.), cert. denied 299 U. S. 563 (1936), in which the Court of Appeals rejected the lower court's reasoning and affirmed solely on the ground that the set-off was related to the main suit.

II.

We submit that an asserted change in policy of the Department of State set forth in a letter by its acting legal adviser cannot be relied upon to upset well established principles of law dealing with sovereign immunity. Indeed, this is admitted in the letter itself, which concludes (next to last paragraph):

> "It is realized that a shift in policy by the executive cannot control the courts. . ."

Even treating this letter as somewhat persuasive, although not binding, upon the Court, it does not purport

to abrogate the doctrine that a sovereign is immune from suit; it seeks only to restrict that doctrine to activities connected with public or governmental functions, as distinguished from private or commercial acts.

If we accept the so-called trend or shift of policy expressed in this letter, it is still necessary to determine whether the claim of immunity is one connected with commercial endeavors or one connected with public or governmental functions. If the plea of immunity relates to a public or governmental transaction, all are agreed that the immunity should be recognized.

Here, the counterclaims against which the plea of sovereign immunity has been sustained, clearly fall within this more limited concept. What could be considered more "governmental" or "public" in nature than the fiscal operations of a sovereign and the bonds or other obligations it issues to raise revenue upon which its very existence depends. Indeed, in its brief to the Court of Appeals petitioner admitted that the obligations alleged in both counterclaims represented loans for "economic" rehabilitation in China, and it conceded in its oral argument that, even within the restricted views of the State Department as expressed in this letter, respondent would be entitled to plead sovereign immunity to the causes of actions alleged in the counterclaims. This appears from the opinion of the Court of Appeals itself, where it said (R. 68):

> "Defendant, as we understand it, does not argue that this new trend, if adopted by our courts, would here serve to deprive plaintiff of its sovereign immunity."

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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LOUIS J. GUSMANO,
Counsel for Respondent
The Republic of China.

April 7, 1954.